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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 503

COMMISSIONER OF INTERNAL REVENUE,
Petitioner

vs.

ESTATE OF MARSHAL L. NOEL, Deceased, WILLIAM H. FRANTZ and RUTH M. NOEL, Executors,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Certiorari Granted December 7, 1964

BRIEF FOR RESPONDENTS

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Errata

We wish to call to the Court's attention the following typographical errors discovered in Respondent's Brief after final printing.

P. 2, 2nd paragraph, line 4—should read:

sued annually) are subject to the approval of state insur-

P. 5, top line—should read:

system . . ." *Treasury Regulations* (1954), Sec. 20.2042-4.

P. 8, 1st paragraph, line 3—should read:

ministrative interpretation to cast these principles aside

P. 10, last paragraph. line 9—should read:

able, Rev. Rul. 5754 (1957), 1 C. B. 298; proceeds of a policy

Respectfully submitted,

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Counter-Statement of Questions Presented

1. Are single trip airplane accident insurance policies which insure against loss of limbs, eyes or life by reason of airplane accident "policies on the life of the decedent" within the meaning of Section 2042(2) of the Internal Revenue Code of 1954?

2. Is a printed provision in a single trip airplane accident insurance policy reserving to the decedent the right, unexercisable on any practical basis, to change the named beneficiary an incident of ownership possessed or exercisable by decedent within the meaning of Section 2042(2) of the Internal Revenue Code?

Counter-Statement

Insofar as petitioner's Statement recites the facts of this case, respondents shall, for the sake of brevity, accept it. The following facts essential to a clear understanding of the case, however, were omitted by petitioner.

Neither of the insurance companies issuing the policies herein were authorized to issue life insurance policies. The policies themselves (of which some 7 or 8 million are issued annually are subject to the approval of state insurance commissions as accident and health coverage and are so considered by the insurance industry (R. 12, 13, 14).

The printed provisions of the policies, which included a reservation by the insured of a right to change the beneficiary, conditioned any change upon both the approval by an executive officer of the insurance company and the endorsement on the policy of any change (R. 31, 35). No such officer was present at the airport (R. 15) and no machinery was there provided by which decedent could delete or change any provisions in the policies (R. 12).

The uncontradicted testimony[1] of decedent's widow established that she paid the premium for each policy (R. 17, 25). The policies were at all times in the possession of decedent's wife and decedent disclaimed any interest therein (R. 18).

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[1] The Tax Court made no finding on this point (R. 45). On appeal, the Court of Appeals accepted her testimony (R. 49).

ARGUMENT

POINT I

Proceeds from single trip airplane accident insurance were not received as insurance under policies on the life of the decedent.

A. The legislative history of Section 2042 precludes holding that Congress intended accident insurance proceeds to be included for estate tax purposes.

The Estate Tax as we know it was first established by Congress in the Revenue Act of 1916. It made no mention of life insurance. Except for life insurance payable to the executor in his fiduciary capacity, life insurance proceeds were not includible. Revenue Act of 1916, 39 Stat. 777 and 778.

The tax has been characterized as an excise "tax on the right to transmit" property from the dead to the living. *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349.

Life insurance payable to a specific beneficiary other than the estate was first taxed in 1918 by the enactment of §402(f) of the Revenue Act of 1918, 40 Stat. 1097, 1098, which read, in pertinent part, as follows:

> "That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated . . .
>
> • • • •
>
> "(f) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess of $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."

This language was not changed[2] until it was amended by §404(g) of the Revenue Act of 1942, 56 Stat. 944, Internal Revenue Code of 1939 (26 U. S. C. §811(g)). The amendment abolished the $40,000. exemption and established as tests for includibility the payment of premiums or the possession by the decedent of "incidents of ownership". The next relevant amendment came with the Internal Revenue Code of 1954. The provision relating to the payment of premiums by decedent-insured was removed, and the applicable law, which was in effect on decedent's death on June 20, 1956 and so remains to this day, is Section 2042. It reads, in pertinent part, as follows:

> "(2) Receivable by other beneficiaries. —To the extent of the amount receivable by all other beneficiaries as insurance under policies on the life of the decedent with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person, * * *"

Thus, the statutory language in question—"insurance under policies on life of the decedent" in the present Act is substantially unchanged from its original introduction in 1918. This language has never been defined by any of the Revenue Acts.[3] Over the years the treasury regulations have defined the term "insurance" as ". . . life insurance of every description, including death benefits paid by fraternal beneficial societies operating under the lodge

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[2] Revenue Act of 1921, C. 136, 42 Stat. 227, Sec. 402 (f); Revenue Act of 1924, C. 234, 43 Stat. 253, Sec. 302(g); Revenue Act of 1926, C. 27, 44 Stat. 9, Sec. 302(g).

[3] In *Walker* v. *U. S.*, 83 F. 2d 103 (8th Cir. 1936), the Court found this statutory language to be ambiguous, and this Court in *Helvering* v. *LeGierse*, 312 U. S. 531, noted "the curious consistency and inadequacy of section 302 (g)."

system . . .." *Treasury Regulations* (1954), Sec. 20.2042-1.[1] "Accident insurance" is not mentioned. The court below found the regulations to be of little help in amplifying and interpreting this section (R. 49).

The legislative history of this language which does not even mention accident policies sheds considerable light on the meaning Congress intended measured by the mischief sought to be corrected and the end sought to be achieved thereby. *Harrison* v. *Northern Trust Co.*, 317 U. S. 476, 479-480; *J. C. Penney Company* v. *C.I.R.*, 312 F. 2d 65, 68 (2d Cir. 1962).

Under the 1916 Revenue Act, life insurance payable to designated beneficiaries was not taxed. It soon came to the attention of Congress that persons of wealth could and were avoiding the estate tax by investing large sums of money in life insurance payable to persons other than their own estates. Congress cut off this escape by means of the Revenue Act of 1918, §402(f), *supra*. The report of the House Committee on Ways and Means (Revenue Act of 1918, 65th Congress, 2d Session, House Report 767, p. 22), which the Court below set forth at some length (R. 53), stated the purpose of Section 402(f) and brought the Court to the conclusion:

> "The obvious intent of Congress and the purpose of the enactment was to foreclose the possibility of tax avoidance under the existing law." (R. 53).

The Congressional purpose of preventing estate tax avoidance in respect to property of the decedent is fur-

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[1] Treasury Regulations 37 (1921 ed.), Art. 32; Treasury Regulations 63 (1922 ed.), Art. 27; Treasury Regulations 68 (1924 ed.), Art. 25; Treasury Regulations 70 (1926 ed.), Art. 25; Treasury Regulations 70 (1929 ed.), Art. 25; Treasury Regulations 80 (1934 ed.), Art. 25; Treasury Regulations 80 (1937 ed.), Art. 25.

ther demonstrated by the other provisions included in §§2035-2043 of the Code. These seek to recoup for estate tax purposes various interests, transfers and dispositions removing from the estate property otherwise includible therein under the definition of "gross estate" in §2033.

Enactment of these sections, each, with the exception of §2039 (concerning annuities), directed at specific dispositions of decedent's interests, should not compel extension of a blanket inclusion to even those instances where a similar purpose is not served.

The 1916 Revenue Act and subsequent enactments, including the above cited provisions, have been aimed at taxation of the decedent's actual estate, including those dispositions which are, as petitioner states, "as a matter of economic reality . . . testamentary . . . and subject to the decedent's control". (Brief p. 8). In reference to enactments subsequent to the Revenue Act of 1916, "it could be plausibly maintained that the greater part of the changes . . . made, apart from the different rates in effect, were devised to prevent circumvention of its general provisions". Montgomery's Federal Taxes, Estates, Trusts and Gifts (1949-50), p. 440-441. Thus, life insurance policies, because they might be, and were, used to transfer actual portions of the estate, were specifically included by §402(f) in 1918.

Petitioner could not and does not contend that single trip airplane accident policies could be used as instruments of tax avoidance or be of use in estate planning. The concept of avoidance necessarily implies a conscious, purposeful attempt to transfer wealth without the imposition of the tax. To say that the payment of an indemnity for loss of life under an accident policy on which no tax will fall is an avoidance is to suggest the purchase of the policy was in anticipation of death by accidental means so that wealth

would be transferred free of tax. Insurance of this type has no place within the legitimate sphere of arranging one's affairs to minimize tax obligations. The very uncertainty of the event—accidental death—precludes the use of accident insurance as an estate planning tool. Since the avowed Congressional purpose was to shut the door on a method of "defeating the estate tax" it cannot reasonably be inferred Congress also intended to place in the same category an indemnity under a policy of the type with which we are here concerned. The concepts of "accident" and "purposeful defeat of the tax" are incompatible.

B. The construction of the language of Section 2042 precludes subjecting proceeds of aviation accident policies to the estate tax.

Since the language used in Section 2042(2) is not defined, under the settled rules of statutory construction it must be given its ordinary, plain and generally accepted meaning, *Hanover Bank* v. *Commissioner*, 369 U. S. 672, 687; *Crane* v. *Commissioner*, 331 U. S. 1, 6; *Old Colony R. Co.* v. *Commissioner*, 284 U. S. 552, 560.

In the event of an ambiguity, any doubt existing as to its construction should be resolved in favor of the taxpayer, *Hassett* v. *Welch*, 303 U. S. 303, 314, or, at least the Court should determine what a fair construction would be, *White* v. *United States*, 305 U. S. 281.

Respondents contend that the ordinary, plain and generally accepted meaning of "insurance under policies on the life of the decedent" under any fair, reasonable construction of those terms would not and does not encompass the single trip airplane accident policies here involved. The plain meaning of life insurance does not include accident insurance nor does accident insurance mean life insurance. See the opinion of the Court of Appeals below at R. 50-51 and authorities cited therein.

Nevertheless, the Court is being urged, on the basis of *Ackerman* v. *Commissioner*, 15 B.T.A. 635 (1929) and administrative interpretation to cast three principles aside and to engraft onto the statute the proceeds of policies here involved on the asserted basis of an all pervading Congressional intent.

The effect, however, if petitioner's position were to be accepted would be to excise from the statute the phrase "policies on the life" and render it surplusage.

The question posed by the instant matter is not, as suggested by Petitioner, whether the statute's purpose and language admit of an "exception" excluding from the gross estate proceeds of policies similar to those here considered. (Brief pp. 10-11). Rather, the inquiry concerns the precise extent to which Congress intended to add to the gross estate for tax purposes something not previously included therein, and more specifically, whether proceeds from flight accident policies should be included "as insurance under policies on the life of the decedent," within the meaning of §2042. But for that section, life insurance paid to a designated beneficiary would not be taxable.

Thus viewed, a reading of the statute indicates, at least that Congress did not specifically include proceeds from flight accident policies. "At no place does the statute attempt any definition of the term 'life insurance', though a glance at any insurance textbook would have indicated the necessity for such a definition if a tax-paying public was to be informed of its rights and obligations." *Paul, Life Insurance and Federal Estate Tax*, 52 Harv. L. Rev. 1037, 1057 n. 58 (1939). See *Helvering* v. *Le Gierse*, 312 U. S. 531, 539 n. 4.

Utilizing principles of statutory construction and considering the manifest distinction between life insurance and accident insurance, as was done by the Court of Appeals

below (R. 50-51), logically compels the finding that accident insurance policies are not included within the statute as noted above. An examination of the legislative history leads to the same conclusion (R. 51-54).

House and Senate Committee reports explicitly revealing Congressional purpose are of "controlling importance" in determining the proper construction of provisions of the Internal Revenue Code. *Commissioner of Internal Revenue* v. *Bilder*, 369 U. S. 499, 503-504 (concerning medical care deduction). Further, construction of the provisions must be based upon an examination of the legislative history of the Code. *Id.* at 505.

The object of the intent of Congress in respect to §402 (f), as plainly stated in the House Report, is manifestly life insurance. Inclusion of accident policies within the intent of the statute should not be by implication, when the same is not supported by the expressed reason underlying enactment of the statute. This is particularly true here "in view of the familiar rule that tax laws are to be construed liberally in favor of taxpayers". *Porter* v. *Commissioner of Internal Revenue*, 288 U. S. 436, 442.

Certainly Congress is aware of the distinction between accident and life insurance. Under §79 of the Code "group-term life insurance on the life of an employee", is not, according to the House-Senate Conference Committee Report, intended to include the death benefits in so-called travel insurance or accident and health policies, where such policies do not provide general death benefits. (This section was added by §204 (a)(1) of the Revenue Act of 1964 to tax to a specified extent as income to an employee the cost of group-term life insurance policies.)

While not controlling, use of the term "life insurance" with reference to §2042 by the Committee reports for the 1954 Code, H. R. Rep. No. 1337, 83d Cong. 2nd Sess. A 316

(1954), S. Rep. No. 1622, 83d Cong. 2nd Sess. 124 (1954), would indicate the intent of Congress to include life insurance policies under the ordinary definition of the term.

The difference between the two types of policies is recognized within the 1954 Code. See §§801; 4371 (2) and 4372 (b)(e). Proposed Treasury Regulations §179-1 (b)(i)(ii)(b), 29 Fed. Reg. 10516-17 (1964) evidence the intent of the Treasury Department itself to accept limited distinctions between the two types of policies. That the Treasury Department does not consider the terms interchangeable is indicated by its separate listings in IRS Document No. 5045 (12-64) pp. 5, 6.

The distinction between life insurance and accident insurance is further indicated by Treasury Regulation §1.101-1 (a) cited in the Appendix to petitioner's brief. That provides "death benefit payments having the characteristics of life insurance proceeds" are excluded from the income tax. Death benefits arising from accident and health insurance contracts, from endowment contracts and workmen's compensation are specifically enumerated as examples. Thus, the Regulation itself indicates that benefits arising from these types of contracts are excluded not because they *are* life insurance, but because they have "characteristics" of life insurance.

Petitioner urges that this Court interpret Sec. 2042 as requiring includibility of all insurance proceeds payable upon the death of the insured. Such interpretation is neither consistent with the language of the section nor administrative interpretations or adjudications. Thus, even proceeds from an insurance policy paid to the executor of decedent who lost his life in a plane crash where the policy provided for such payments upon death, was ruled not taxable. Rev. Rul. 5754 (1957), 1 C.B. 298; proceeds of a policy payable to a beneficiary upon suicide of the assured mea-

sured by the premiums paid, was held not to be insurance. *Chew* v. *Commissioner*, 148 F. 2d 76 (5th Cir. 1954), cert. den. 325 U. S. 882. If Congress wished to tax all proceeds and was able to constitutionally do so, it could have provided includibility for all proceeds payable under any policies of life or accident insurance or payments made upon death under any other type of agreement. This has not been done.

Bearing in mind the purpose of Congress in its inclusion of life insurance proceeds was to "foreclose the possibility of tax avoidance", to what extent may the purchase by a decedent of limited accident insurance policies be denominated a transfer or disposition of his estate, or, a means of estate tax avoidance? Yet, if a reason is to be found for inclusion of limited accident policies within the Congressional intent of §2042, it must be on this basis. They are not specifically included by the statute. Neither are they included through statutory construction, nor by the expressed intent of the House Committee Report.

Thus amounts recoverable by beneficiaries under workmen's compensation as death benefits, Rev. Rul. 56-637, C B 1956-2, p. 600; or under wrongful death statutes, Rev. Rul. 54-19 CB 1954-1 p. 179; as social security death benefits, ET 18 CB 1940-2 p. 285; and as Armed Forces Gratuity Pay, Rev. Rul. 55-581, CB 1955-2 p. 381 are not taxable.

The reasons for exclusion from the estate tax of these death benefits payable to specific beneficiaries apply also to the accidental death policy benefits here considered. However, the purpose motivating the inclusion of life insurance policies in the estate tax is completely absent when considered in relation to death benefits under accidental death policies as well as to the benefits mentioned above.

The Court of Appeals below, as the first appellate court to consider this problem, has held that *Ackerman* was decided erroneously. The petitioner in relying on *Ackerman* urges, in effect, that a bad case like good wine mellows with age. Moreover, *Ackerman* in relying upon *Logan* v. *Fidelity & Casualty Co.*, 146 Mo. 114 (1898) ignored later Missouri decisions which were contrary to *Logan*.[5]

Petitioner further urges that the continuing administrative interpretation of the statute in accordance with the *Ackerman* decision has gathered the force of law through the failure of Congress to limit that interpretation in the course of subsequent reenactments of the statute. It should be pointed out, however, that such reenactment, in the absence of controversy over the existing interpretation of the statute, has little significance. Hart & Sacks, Legal Process, 1401-02 (tent. ed. 1958). Further, it is obvious that Congress, particularly with respect to tax statutes, could not be familiar with, or aware of, all existing interpretations of each statute. Thus, it does not necessarily follow that reenactment incorporates the existing interpretation, whatever that happens to be. *Ibid.* And, the lack of Congressional attention to §2042 and its predecessors has heretofore been noted. See *Helvering* v. *Le Gierse*, *supra*, 312 U. S. at 539 n. 4.

It might further be noted that citation of *Ackerman* by the Court in *Le Gierse*, at 312 U. S. 539-40, noted by petitioner (Brief p. 6), was not on the precise issue before the Court in the instant case and in *Ackerman*, namely, wheth-

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[5] *Jones* v. *Prudential Insurance Co. of America*, 208 Mo. App. 679, 236 S. W. 429 (Ct. App., 1922); *Brunswick* v. *Standard Acc. Ins. Co.*, 278 Mo. 154, 213 S. W. 45 (1919); *Andrus* v. *Business Men's Acc. Assn.*, 283 Mo. 442, 223 S. W. 70 (1920); *Aufirchtig* v. *Columbian National Ins. Co.*, 298 Mo. 1, 249 S. W. 912 (1923).

er accident insurance policies are "policies on the life of decedent" within the meaning of §2042. The specific question in *Le Gierse* was whether the subject contracts were "insurance" by virtue of containing the elements of risk-shifting and risk-distribution that characterize it.

An examination of the authorities cited by petitioner (Brief p. 6) as indicating unqualified acceptance of *Ackerman*, discloses that those texts merely state the holding expressed there as they do with other decided cases. Neither does similar publicity afforded a reported case by tax reference works validate the law therein announced.

Petitioner asserts that the Court of Appeals' distinction of evitability between life insurance and accident insurance would remove from the estate tax "such widely used instruments of estate planning as double indemnity and term insurance" (Brief p. 5). While we seriously doubt the petitioner's claim that double indemnity is widely used in estate planning, his position is a perversion of the holding in the instant case. In the first place, the Court of Appeals carefully limited its decision to the flight policies in question by stating: "We are of the opinion, and so hold, that the term 'insurance under policies on the life of a decedent' does not comprehend insurance under accident policies of the kind here in question." The fact is that under a double indemnity policy the "risk" involved is nevertheless death and not "accident". The fact of accident merely determines the amount of payment. Secondly, the Commissioner's suggestion that the proceeds from term life insurance policies may be excluded is absurd. Term life insurance which matures upon death, regardless of cause, is just as effective a form of insurance on the life of decedent as ordinary, limited payment, or endowment life insurance. It has just nothing to do with accident insurance in this context.

C. Neither taxation policy nor constitutional limitations permit taxation of proceeds from single trip airplane accident insurance policy.

Taxation of the proceeds of the airplane accident would not further the purpose of the estate tax—the prevention of accumulated wealth being passed on, undiminished, from generation to generation. Thus, the graduated taxation of all property in which the decedent had an interest is employed to carry out the purpose. Also, transfer of any real interest in property whether by testamentary means or by legal devices analogous to testamentary disposition such as dower rights, joint tenancies, non-exercise of powers of appointment, are included.

It must be noted that in each of the above categories the decedent during his life owned a valuable asset which was transferred by his death. No case has been found in which this Court held that the estate tax could be constitutionally applied to any property having no substantial value during decedent's lifetime. To justify includibility, property of economic value must be owned or controlled by the decedent which is transferred by his death., *Lewellyn* v. *Frick*, 268 U. S. 238.

The mere receipt of property by a beneficiary upon a decedent's death does not, of itself, constitute a predicate for inclusion. The tax is not upon the receipt of property by a beneficiary but upon the transfer of property in which decedent owned or controlled a valuable interest when he died. *Walker* v. *U. S.*, 83 F. 2d 103, 110 (8th Cir. 1936).

In passing upon the constitutionality of the tax on life insurance proceeds, this Court, in *Chase National Bank* v. *U. S.*, 278 U. S. 327, held that where the decedent possessed economically valuable rights in life insurance policies, his death, by extinguishing those rights worked, in effect, a testamentary disposition.

Said the Court:

"A power in the decedent to surrender and cancel the policies, to pledge them as security for loans and the power to dispose of them and their proceeds for his own benefit during his life which subjects them to the control of a bankruptcy court for the benefit of his creditors (Cohen v. Samuels, 245 U. S. 50, 62 L. ed. 143, 38 Sup. Ct. Rep. 36; see Burlingham v. Crouse, 228 U. S. 459, 57 L. L. ed. 920, 46 L.R.A. (N.S.) 148, 33 Sup. Ct. Rep. 564), and which may, under local law applicable to the parties here, subject them in part to the payment of his debts (N. Y. Domestic Relations Laws, chap. 14; Consol. Laws, §52; Kittel v. Domeyer, 175 N. Y. 203, 67 N. E. 433; Guradian Trust Co. v. Straus, 139 App. Div. 884, 123 N. Y. Supp. 852, affirmed in 201 N. Y. 546, 95 N. E. 1129), is by no means the least substantial of the legal incidents of ownership, and its termination at his death so as to free the beneficiaries of the policy from the possibility of its exercise would seem to be no less a transfer within the reach of the taxing power than a transfer effected in other ways through death."

The kind of substantial interests in policies referred to by the Court cannot be equated to the incipient interest that the decedent may have had in the airplane flight policies here involved. He had nothing of value which was properly includible for estate taxation, regardless of whether or not he can be said to have retained a right to change the beneficiary in the policies.

The inherently speculative nature of these policies—the infinitesimal chance of an airplane accident—the almost minimal premium charged, remove it from the testamentary-like disposition of property required by this Court

for purposes of includibility. The actuarial statistics comparing total deaths with accidental deaths due to airplane accidents clearly substantiate this. In 1963, the death rate per 1000 population in the United States was 9.6.[6] By comparison, of some 77,430,000 commercial airplane passengers in 1963, a total of 264 fatalities were recorded.[7] Thus, the incidence of deaths due to an airplane accident as opposed to death by any means is 1 to 6867. The infinitesimal chance of death by reason of an airplane accident demonstrates the lack of value of decedent's interest in the policies.

Consistent with the primary intent to prevent untaxed transfer of substantial wealth, §2042(2) of the Internal Revenue Code of 1954 requires at least a 5% reversionary interest in a life insurance policy before it is taxed as a part of decedent's estate. When viewed even against this 5% interest standard, decedent's interest in these policies was for all practical purposes nil.

D. Airplane accident policies are not "policies on the life of the decedent".

The policies here considered—airplane accident insurance—indicate a purpose and coverage distinct from life insurance. Initially, it should be pointed out that in the insuring agreements, the hazard protected against is an accident (R. 31, 35); that the issuing companies are not authorized to sell life insurance (R. 12, 13); that a license is not required for an agent selling this type of coverage, although examination and licensing is required in the sale

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[6] Total number of deaths 1,813,000. Statistical Abstract of the United States (1964 ed.), p. 48.

[7] F.A.A. Statistical Handbook of Aviation (1964 ed.), pp. 121, 143.

of life insurance, *New York Insurance Law* §113 (3), 114 (3) (a); that neither the general public nor the insurance industry consider this type of insurance life insurance (R. 14), and that the underwriting principles involved in the two types of policies are totally different (R. 13, 14). In the instant policies no life insurance underwriting factors are present, such as the insured's age, health, hereditary background, moral status, temperance and occupation, obviously because the insurance company neither intended to, nor did issue "a policy on the life of the decedent." These policies were no more insurance "on the life of the decedent" than they were insurance on his feet, hands or eyes. Loss of life, feet, hands or eyes resulting from an accident merely established the measure of the indemnity.

It is certainty of payment which gives life insurance its substance and provides the basis of taxability. *Helvering* v. *Illinois Life Ins. Co.*, 299 U. S. 88, 91. "Death, the risk of life insurance, the event upon which the insurance money is payable, is certain of occurrence, the uncertainty of the time of its occurrence is the material element and consideration of the contract." *Ritter* v. *Mutual Life Insurance Company*, 169 U. S. 139, 158.

By way of contrast, liability under the policies here involved arises only upon the happening of an accident resulting in injury.

If decedent while enroute had died as a result of heart attack, disease or any other natural cause, typical insurance upon his life would have matured simply because of the fact of death, but regardless of death or injury, recovery under the instant policies was conditioned upon an unexpected happening—accident.

The fundamental differences between life and accident insurance are reflected not only in the different reasons

for which each is purchased, but in the inherent differences in the principles of coverage, and underwriting requirements. Not the least glaring of these differences is the comparison between the measured, inevitable and sure happening of death, and the highly speculative, evitable, uncertain occurrence of an accident. This sureness of death is accurately reflected in mortality and actuarial tables. The likelihood of death of any individual can be statistically computed and measured in dollars and cents. Thus every life insurance policy, be it term, limited payment, ordinary, or endowment, has a discernable value which is present from the moment the policy is issued. This value gives the assured an immediate and real asset over which he may exercise control. By way of contrast, an accident policy represents a gamble, without economic value, and is incapable of measurement or valuation. These fundamental differences require different tax treatment.

POINT II

Decedent possessed no exercisable incidents of ownership.

The Tax Court found that the printed provisions in the policies reserving to the insured the right to change the beneficiary were an incident of ownership which brought the policies within the provisions of Section 2042(2) (R. 42 to 47). The Court of Appeals, while acknowledging that the right of assignment and change of beneficiary were exercisable incidents of ownership within the meaning of the statute, made no finding that decedent did, in fact, have those rights (R. 49). It found the Tax Court decision rested solely on the *Ackerman* case (R. 50). Coming to the conclusion it did, the Court of Appeals had no occasion to consider respondents' argument below that decedent had no incidents of ownership in the policies.

Respondents contend that decedent's widow purchased the policies and was the contracting party with the carriers. In signing the application forms decedent was doing nothing more than was necessary to effectuate the insurance. That act was equivalent to the insured submitting to a necessary physical examination for the issuance of an ordinary life policy purchased by his wife over which she held all incidents of ownership. See *National Metropolitan Bank of Washington* v. *U. S.*, 87 Fed. Supp. 773 (Ct. Claims 1950).

Moreover, even if decedent by reason of the unwanted stereotype policy provision imposed upon him be deemed to have possessed the right to change the beneficiary, it was impossible in any practical way to have exercised said right and it was, therefore, a complete nullity.

The term "incidents of ownership" is not employed in the statute in a technical legal sense but in an economic sense. *Sen. Rep. No. 1631*, 77 Cong. 2d Sess., p. 235; *H. R. Rep.* 2333, 77 Cong. 2d Sess., p. 163; *26 C.F.R.* Sec. 2042-1(c)(2).

Here, by their terms, the policies reserved to the decedent the following "rights": (1) The right to surrender the policy; (2) the right to receive benefits in the event an accident resulted in injury other than loss of life; and (3) the right to change beneficiaries.

Respondents contend that exercisable incidents of ownership within the meaning of 2042 must be substantial and significant—not empty, illusory and valueless. Unless decedent possessed in the policies substantial and effective rights which were exercisable by him in a practical, realistic manner, the proceeds were not includible for tax purposes. *Lewellyn* v. *Frick*, 268 U. S. 238; *Chase National Bank* v. *U. S.*, 278 U. S. 327. The policies here considered by their nature were devoid of such valuable rights.

Under the policy provisions, the right to cancel or surrender lapsed upon the start of the flight. Even if decedent had such right before the flight, it expired when he boarded the plane.[8]

Nor was the assured's right to receive disability compensation such an incident of ownership as to require inclusion. This was not a right that could defeat the right of decedent's widow either as beneficiary or owner. The result of an accident being either injury or death is the determinent factor and thus death did not extinguish such right. It was extinguished by the accident.

Nor was the right to change the beneficiary exercisable in any practical way. It must be remembered that not all incidents of ownership dictate taxation but only those that are exercisable have such an effect. *Internal Revenue Code*, §2042(2).

The possession of an empty power which cannot be exercised is not a predicate for taxation. If Congress had intended all incidents of ownership to require taxation regardless of the practical substance, Sec. 2042(2) would not condition taxability on exercisability.

The mere fact that the printed form gave decedent this right is not of conclusive significance.[9] Courts have gone behind the printed forms to determine if the decedent really did have such rights.[10]

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[8] Decedent's wife couldn't surrender the policies which were in her possession for the same reason, and such right was not in existence at the time of decedent's death.

[9] Decedent could make no changes in the policy regarding this practically unexercisable right or in any other respect. (R. 12, 31, 35).

[10] *Estate of Edward Doerkin*, 46 B. T. A. 809 (1942); *Schlontalla* v. *Hickey*, 149 F. 2d 687 (2d Cir. 1945), cert. den. 326 U. S. 756; *National Metropolitan Bank of Washington* v. *U. S.*, 87 Fed Supp. 773 (Ct. of Claims, 1950); *District of Columbia* v. *Wilson*, 216 F. 2d 630 (D. C. Cir. 1954).

This is not a case where the purchaser had a choice in the provisions, but was relegated to the boiler-plate provisions as written.

The inflexible printed form was prepared by the insurance companies for their own purposes and without the consent of the decedent. *New York Insurance Law*, §164(3)(A)(12).

It is significant that the "boiler plate" reservation of the right to change the beneficiary is almost never exercised under the type of policy here involved. Of the millions of such policies sold each year, the President of the leading sales company for such policies testified he knew of no change of beneficiary and estimated, if any, fewer than 10 changes of beneficiary in the last thirteen years (R. 10, 11), —a maximum of 10 changes in almost 100,000,000 policies.

As the Court in *National Metropolitan Bank of Washington* v. *U. S.*, 87 Fed. Supp. 773 (Ct. of Claims 1950), aptly stated, at p. 776:

> "We are not willing to disregard the manifest substance for a technical legal shadow . . . a legal technicality is a two-edged sword. The Courts in many cases have rightly sought the substance in requiring the payment of taxes even though a frame-work of form would have indicated otherwise. If we look behind the form for the substance to prevent tax dodging we should do the same to prevent a wrong against the taxpayer."

Such a right was clearly without practical value. Being air borne, decedent would have been unable to exercise this right either alone or in conjunction with any other person, even if he wished so to do. He had no way of notifying the insurance companies or the beneficiary. Even if he could communicate his desires, it would be to no avail as it was

necessary, under the policies, to have this change *endorsed* upon the policies, and this was beyond his power or control. Nor may it be fairly contended that the "right" might have been exercised for him.

The cases such as *Estate of Edward L. Hurd* v. *C.I.R.*, 6 T.C. 819, aff'd. 160 F. 2d 610 (1st Cir. 1947); *In re Inman's Estate*, 18 T.C. 522, rev'd. on other grounds, 203 F. 2d 679 (2d Cir. 1953); *Estate of Virginia H. West* v. *C.I.R.*, 9 T.C. 736, aff'd. 173 F. 2d 505 (8th Cir. 1947), which have rejected a settlor-trustee's physical incompetence or mental incompetence to exercise certain rights under a trust as a reason for not including the trust funds within the settlor-trustee's gross estate, have no application here. In those cases, the rights possessed by the alleged incompetents could have been exercised by a guardian appointed by the Court. Here, the rights themselves could not be exercised, first because decedent was unable to do so at all times that the policies were operative and, secondly, because he could not comply with the required procedures. Nor could his wife. Since decedent's wife as owner had possession of the policies at all times, decedent was never in a position to defeat her rights and thus was never possessed of any incidents of ownership in the policies. *U. S.* v. *Burgo*, 175 F. 2d 196, (3rd Cir. 1949).

While the policy covered a return trip, it might be speculated whether decedent could conceivably change the beneficiary before making his return trip. It must be noted that not even the wife could effectuate such a change without endorsement on the policies. Nor is such speculation allowed because only the events occurring prior to decedent's death may be construed in determining the existence of a taxable interest. *Goldstone* v. *U. S.*, 325 U. S. 687, 693.

But any attempt on the part of decedent to change the beneficiary would fail because his wife owned and had possession of the policies—an ownership which she could legally enforce—and the policies were not available to decedent for endorsement or change.

CONCLUSION

For the above stated reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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March 1965.

SUPREME COURT OF THE UNITED STATES

No. 503.—October Term, 1964.

Commissioner of Internal Revenue, Petitioner, v. Estate of Marshal L. Noel, Deceased, William H. Frantz and Ruth M. Noel, Executors.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[April 29, 1965.]

Mr. Justice Black delivered the opinion of the Court.

This is a federal estate tax case, raising questions under 26 U. S. C. § 2042 (2) (1958 ed.), which requires inclusion in the gross estate of a decedent of amounts received by beneficiaries other than the executor from "insurance under policies on the life of the decedent" if the decedent "possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person . . . ."[1] The questions presented in this case are whether certain flight insurance policies payable upon the accidental death of the insured were policies "on the life of the decedent" and whether at his death he had

[1] "§ 2042. Proceeds of life insurance.

"The value of the gross estate shall include the value of all property—

"(1) Receivable by the executor.

"To the extent of the amount receivable by the executor as insurance under policies on the life of the decedent.

"(2) Receivable by other beneficiaries.

"To the extent of the amount receivable by all other beneficiaries as insurance under policies on the life of the decedent with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person . . . ."

reserved any of the "incidents of ownership" in the policies.

These issues emerge from the following facts. Respondent Ruth M. Noel drove her husband from their home to New York International Airport where he was to take an airplane to Venezuela. Just before taking off, Mr. Noel signed applications for two round-trip flight insurance policies, aggregating $125,000 and naming his wife as beneficiary. Mrs. Noel testified that she paid the premiums of $2.50 each on the policies and that her husband then instructed the sales clerk to "give them to my wife. They are hers now, I no longer have anything to do with them." The clerk gave her the policies, which she kept. Less than three hours later Mr. Noel's plane crashed into the Atlantic Ocean and he and all others aboard were killed. Thereafter the companies paid Mrs. Noel the $125,000 face value of the policies, which was not included in the estate tax return filed by his executors. The Commissioner of Internal Revenue determined that the proceeds of the policies should have been included and the Tax Court sustained that determination, holding that the flight accident policies were insurance "on the life of the decedent"; that Mr. Noel had possessed exercisable "incidents of ownership" in the policies at his death; and that the $125,000 paid to Mrs. Noel as beneficiary was therefore includable in the gross estate. 39 T. C. 466. Although agreeing that decedent's reserved right to assign the policies and to change the beneficiary amounted to "exercisable incidents of ownership within the meaning of the statute," the Court of Appeals nevertheless reversed, holding that given "its ordinary, plain and generally accepted meaning," the statutory phrase "policies on the life of the decedent" does not apply to insurance paid on account of accidental death under policies like those here. 332 F. 2d 950. The Court's reason for drawing the distinction was that under a life insurance

contract an insurer "agrees to pay a specified sum upon the occurrence of an *inevitable* event," whereas accident insurance covers a risk "which is *evitable* and not likely to occur." (Emphasis supplied.) 332 F. 2d, at 952. Because of the importance of an authoritative answer to these questions in the administration of the estate tax laws, we granted certiorari to decide them. 379 U. S. 927.

I.

In 1929, 36 years ago, the Board of Tax Appeals, predecessor to the Tax Court, held in *Ackerman* v. *Commissioner*, 15 B. T. A. 635, that "amounts received as accident insurance" because of the death of the insured were includable in the estate of the deceased.[2] The Board of Tax Appeals recognized that "there is a distinction between life insurance and accident insurance, the former insuring against death in any event and the latter . . . against death under certain contingencies. . . ." The Court of Appeals in the case now before us considered this distinction between an "inevitable" and an "evitable" event to be of crucial significance under the statute. The Board of Tax Appeals in *Ackerman* did not, stating "we fail to see why one is not taken out upon the life of the policy-holder as much as the other. In each case the risk assumed by the insurer is the loss of the insured's life, and the payment of the insurance money is contingent upon the loss of life." This view of the Board of Tax Appeals is wholly consistent with the language of the statute itself which makes no distinction between "policies on the life of the decedent" which are payable in all events and those payable only if death comes in a certain way or within a certain time. Even were the statutory language less

[2] Section 302 (g) of the Revenue Act of 1924, which was applicable in *Ackerman*, provided that the estate should include all proceeds receivable by other beneficiaries "under policies taken out by the decedent upon his own life." 43 Stat. 253, 304–305.

clear, since the Board of Tax Appeals' *Ackerman* case it has been the settled and consistent administrative practice to include insurance proceeds for accidental death under policies like these in the estates of decedents. The Treasury Regulations remain unchanged from the time of the *Ackerman* decision [3] and from that day to this Congress has never attempted to limit the scope of that decision or the established administrative construction of § 2042 (2), although it has re-enacted that section and amended it in other respects a number of times.[4] We have held in many cases that such a long-standing administrative interpretation, applying to a substantially re-enacted statute, is deemed to have received congressional approval and has the effect of law. See, *e. g.*, *National Lead Co.* v. *United States*, 252 U. S. 140, 146; *United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459, 466. We hold here that these insurance policies, whether called "flight accident insurance" or "life insurance," were in effect insurance taken out on the "life of the decedent" within the meaning of § 2042 (2).

II.

The executors' second contention is that even if these were policies "on the life of the decedent," Mrs. Noel owned them completely, and the decedent therefore possessed no exercisable incident of ownership in them at

[3] 26 C. F. R. § 20.2042–1 (a)(1). See also Treas. Reg. § 105 (1939 Code), § 81.25; Treas. Reg. 80 (1934 ed.), Art. 25; Treas. Reg. 70 (1926 ed. and 1929 ed.), Art. 25; Treas. Reg. 68 (1924 ed.), Art. 25; Treas. Reg. 63 (1922 ed.), Art. 27; and Treas. Reg. 37 (1921 ed.), Art. 32.

[4] Section 2042 was first enacted as § 402 (f) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1097–1098. This section was re-enacted in § 402 (f) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 278–279; in § 302 (g) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 304–305, and the Revenue Act of 1926, c. 27, 44 Stat. 9, 70–71; and in § 811 (g) of the Internal Revenue Code of 1939.

the time of his death so as to make the proceeds includable in his estate. While not clearly spelled out, the contention that the decedent reserved no incident of ownership in the policies rests on three alternative claims: (a) that Mrs. Noel purchased the policies and therefore owned them; (b) that even if her husband owned the policies, he gave them to her, thereby depriving himself of power to assign the policies or to change the beneficiary; and (c) even assuming he had contractual power to assign the policies or make a beneficiary change, this power was illusory as he could not possibly have exercised it in the interval between take-off and the fatal crash in the Atlantic.

(a) The contention that Mrs. Noel bought the policies and therefore owned them rests solely on her testimony that she furnished the money for their purchase, intending thereby to preserve her right to continue as beneficiary. Accepting her claim that she supplied the money to buy the policies for her own benefit (which the Tax Court did not decide), what she bought nonetheless were policy contracts containing agreements between her husband and the companies. The policy contracts themselves granted to Mr. Noel the right either to assign the policy or to change the beneficiary without her consent. Therefore the contracts she bought by their very terms rebut her claim that she became the complete, unconditional owner of the policy with an irrevocable right to remain the beneficiary.

(b) The contention that Mr. Noel gave or assigned the policies to her and therefore was without power thereafter to assign them or to change the beneficiary stands no better under these facts. The contract terms provided that these policies could not be assigned nor could the beneficiary be changed without a written endorsement on the policies. No such assignment or change of beneficiary was endorsed on these policies, and consequently

the power to assign the policies or change the beneficiary remained in the decedent at the time of his death.

(c) Obviously, there was no practical opportunity for the decedent to assign the policies or change the beneficiary between the time he boarded the plane and the time he died. That time was too short and his wife had the policies in her possession at home. These circumstances disabled him for the moment from exercising those "incidents of ownership" over the policies which were undoubtedly his. Death intervened before this temporary disability was removed. But the same could be said about a man owning an ordinary life insurance policy who boarded the plane at the same time or for that matter about any man's exercise of ownership over his property while aboard an airplane in the three hours before a fatal crash. It would stretch the imagination to think that Congress intended to measure estate tax liability by an individual's fluctuating, day-by-day, hour-by-hour capacity to dispose of property which he owns. We hold that estate tax liability for policies "with respect to which the decedent possessed at his death any of the incidents of ownership" depends on a general, legal power to exercise ownership, without regard to the owner's ability to exercise it at a particular moment. Nothing we have said is to be taken as meaning that a policyholder is without power to divest himself of all incidents of ownership over his insurance policies by a proper gift or assignment, so as to bar its inclusion in his gross estate under § 2042 (2). What we do hold is that no such transfer was made of the policies here involved. The judgment of the Court of Appeals is reversed and the judgment of the Tax Court is affirmed.

It is so ordered.

MR. JUSTICE DOUGLAS dissents.